BRB No. 97-0757 BLA

CORBIN BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-193) of Administrative Law Judge Gerald M. Tierney awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.

§901 *et seq.* (the Act). This case involves a request for modification on a duplicate claim.[1] After crediting claimant with forty-three years of coal mine employment, the administrative law judge found that claimant had established a basis for modification. Considering the evidence, the administrative law judge found that claimant established totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4). Accordingly, benefits were awarded. The administrative law judge ordered employer to pay benefits to claimant commencing on the date of Dr. Baker's opinion, April 11, 1995. On appeal, employer contends that the Act prohibits modification of a duplicate claim and challenges the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs (the Director) responds, urging the Board to affirm the administrative law judge's consideration of claimant's request for modification in this duplicate claim.

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in permitting claimant to file a request for modification on a denied duplicate claim. Petition for Review at 14-15. Employer also argues that claimant may not file successive modification requests. Petition for Review at 15 - 17. Employer argues that the "interests of justice" have not been served in permitting claimant to litigate his claim for almost twenty-five years

[1]Claimant filed his first claim with the Social Security Administration in May 1973, which was denied. Director's Exhibit 32. The claim was reopened pursuant to the 1977 Amendments to the Act, and after denying the claim again, the Social Security Administration forwarded the claim to the Department of Labor. The claim was denied by a district director on June 1, 1981. *Id*. Claimant took no further action on that claim until the filing of the present claim on March 6, 1992. Director's Exhibit 1. This claim has been denied three times by a district director, and each time, claimant filed a request for modification. Director's Exhibits 11-18. After the third denial, claimant requested a hearing before an administrative law judge. Director's Exhibit 19.

and that the issue of whether claimant established a change in conditions or mistake in fact is now *res judicata*. Petition for Review at 12, 15 - 16. Furthermore, employer contends that the administrative law judge's conclusion that claimant is entitled to modification is without support as he failed to consider whether any mistakes in fact in the prior denials have been made or whether the evidence points to a "material change in conditions." Petition for Review at 12 - 13, 17.

Contrary to employer's contentions, in *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988), the Board noted the regulatory scheme providing for continuing availability of modification proceedings within one year following any denial by the district director, even after the district director has considered modification once. *See Garcia*, *supra*. The adjudicative actions to be taken by the district director under Section 725.310(c) at the conclusion of modification proceedings all provide subsequent opportunities to seek modification of that action. *See* 20 C.F.R. §§725.310(c), 725.409(b), 725.418(a), 725.419(d), 725.421. To achieve the intent of Congress underlying Section 22 of the Act, 33 U.S.C. §922, the parties, as well as the district director on his or her own motion, may request modification of *any* decision issued by the district director, as the condition of the miner may change, in view of the progressive nature of pneumoconiosis, or a mistake in fact could be discovered as the district director considers new evidence in the procedure. 33 U.S.C. §922; *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *see generally Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986). Employer's contention that the "interests of justice" have not been served in permitting claimant to "perpetually relitigate his claim" is without merit because the regulations specifically provide that a claimant may request the fact-finder to reconsider the denial of benefits at any time before one year after the denial of a claim. *See* 20 C.F.R. §725.310. Moreover, as the Director argues, if Dr. Baker's opinion, which is the evidence which claimant submitted with his most recent request for modification, is credible, then claimant has a justifiable basis for seeking modification. Director's Brief at 7.

Employer's contention that claimant may not file a request for modification on a duplicate claim is also without merit. While employer is correct that the standards for establishing a basis for modification in a claim and establishing a basis for a review of the merits in a duplicate claim are differing, employer fails to articulate why factual determinations made in the context of duplicate claims are not subject to modification. The purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Director, OWCP v. Drummond Coal Co., [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). Furthermore, the submission of additional evidence for consideration on modification provides the administrative law judge an opportunity to determine whether the condition of the miner has changed. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying*, 14 BLR 1-156 (1990). Since a change in conditions or a mistake in fact can

occur within the context of a duplicate claim, the administrative law judge did not err in considering claimant's third request for modification in this duplicate claim.

We also reject employer's contention that the administrative law judge did not properly consider the evidence to demonstrate if claimant established a basis for modification and that the administrative law judge's "bald conclusion" that claimant is entitled to modification is inadequate. Petition for Review at 13, 17. The administrative law judge is not required to make a preliminary determination regarding whether claimant has established a basis for modification of the district director's denial of benefits prior to reaching the merits of entitlement. The Board has held that such a determination is subsumed into the administrative law judge's decision on the merits. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Turning to the administrative law judge's consideration of the evidence pursuant to Section 718.202(a)(4), employer argues that the administrative law judge's findings failed to comply with statutory requirements because he failed to consider whether the medical opinions were reasoned and documented and did not give any explanation of his rationale for crediting certain medical opinions. Petition for Review at 19-20. Employer also contends that the administrative law judge erred in crediting the opinions of Drs. Wright, Myers and Baker because their opinions were based on positive x-ray readings, and Dr. Wicker's opinion, which was based exclusively on a positive x-ray interpretation. Petition for Review at 20-24. Lastly, employer contends that the administrative law judge erred by failing to accord weight to the opinion of Dr. Dahhan that claimant does not suffer from pneumoconiosis.[2] Petition for Review at 20.

[2]We affirm the administrative law judge findings pursuant to Section 718.202(a)(1) as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The entirety of the administrative law judge's findings at Section 718.202(a)(4) are contained in a three sentence paragraph in which the administrative law judge found that four of the five most recent opinions state that claimant had pneumoconiosis. Decision and Order at 4. The administrative law judge stated that because the opinions present a more complete description of claimant's condition than the x-rays, he accorded greater weight to them and found that the preponderance of the medical opinion evidence demonstrates that claimant had pneumoconiosis pursuant to Section 718.202(a)(4).[3] *Id*. We agree with employer that these findings by the administrative law judge fail to comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We therefore vacate and remand the case to the administrative law judge for further discussion of the medical opinion evidence pursuant to Section 718.202(a)(4). On remand, the administrative law judge must discuss each opinion specifically, consider the underlying bases of these opinions to determine whether they are reasoned and documented, and explain fully his reason for crediting the opinions that he determines to be credible. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge must also consider whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3). Lastly, on remand, the administrative law judge should consider whether Dr. Wicker's diagnosis of pneumoconiosis constitutes a reasoned medical opinion pursuant to Section 718.202(a)(4) or is based exclusively on his x-ray interpretation.[4] 20 C.F.R. §§718.102 and 718.202(a)(4); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Director's Exhibit 7.

Next, employer challenges the administrative law judge's Section 718.204(c) findings. Employer first argues that the administrative law judge failed to consider all like and unlike evidence in concluding that claimant established total disability. Petition for Review at 25. Employer next contends that the administrative law judge's decision to credit Dr. Baker's opinion constitutes error as the administrative law judge failed to explain his

[3]The administrative law judge is not required to weigh contrary probative evidence pursuant to 20 C.F.R. §718.202(a), and thus, need not have found the medical opinion evidence to be more persuasive than the x-ray evidence in order to find pneumoconiosis established. *See Church v. Eastern Associated Coal Corp.*, BLR , BRB No. 95-0516 BLA (Sept. 30, 1997), *modifying on recon.*, 20 BLR 1-8 (1996); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991).

[4]Dr. Wicker obtained claimant's work, smoking and employment histories, performed a physical examination, and conducted objective tests. Dr. Wicker diagnosed pneumoconiosis, 0/1, p/p. Director's Exhibit 7.

reason for doing so. Petition for Review at 25. Employer contends that Dr. Baker's opinion does not constitute a finding of total disability because the physician characterized claimant's respiratory impairment as mild and never addressed claimant's actual ability to perform his usual coal mine employment. Petition for Review at 26. Employer also contends that the record does not support the administrative law judge's finding that Dr. Baker's credentials are superior to the credentials of the other physicians submitting opinions on claimant's disability. Petition for Review at 27. Employer argues that Dr. Dahhan's opinion should be credited because the physician has the same credentials as Dr. Baker, and because the administrative law judge erred in discrediting Dr. Dahhan's opinion because the physician did not diagnose pneumoconiosis. Petition for Review at 28. Lastly, employer argues that the administrative law judge failed to accord proper deference to Dr. Wicker, claimant's treating physician. Petition for Review at 30.

At Section 718.204(c), the administrative law judge listed all results of both blood gas and pulmonary function studies and found that none meet the criteria for establishing disability. Decision and Order at 5. The administrative law judge then stated that of the five physicians submitting opinions, Drs. Myers, Wright and Wicker did not find claimant to be disabled and that he accorded the least weight to the opinions of Drs. Carey and

Dahhan, the former because the opinion was too old, and the latter because the physician did not diagnose pneumoconiosis. *Id*. The administrative law judge then gave the greatest weight to Dr. Baker's opinion[5] that claimant is totally disabled due to pneumoconiosis

[5]Dr. Baker completed a standard form for the State of Kentucky's Workers' Compensation Board. Dr. Baker noted twenty-three years of underground coal mining and twenty and one-half years of surface mine employment. The physician noted symptoms, performed a physical examination, and performed pulmonary function and blood gas studies. He diagnosed pneumoconiosis based on x-ray and significant exposure, mild resting arterial hypoxemia, chronic obstructive pulmonary disease and bronchitis. When asked if the miner was physically able from a pulmonary standpoint to do his usual coal mine employment, the physician checked "no", and advised claimant against further exposure. The physician further stated that claimant would have difficulty doing sustained manual labor on an eight hour basis even in a dust-free environment. Director's Exhibit 18.

because the physician was board-certified, had by far the best qualifications, and because the opinion was consistent with claimant's testimony. *Id*.

We agree with employer that the administrative law judge failed to consider all like and unlike evidence before concluding that claimant established total disability pursuant to Section 718.204(c). We therefore vacate the administrative law judge's finding that claimant established total disability and remand the case to the administrative law judge. The administrative law judge should first determine whether claimant established total disability pursuant to Section 718.204(c)(3). Then, the administrative law judge should discuss the contrary probative evidence, assign the appropriate weight to that evidence and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Furthermore, the administrative law judge must consider whether Dr. Baker's opinion is reasoned and documented.[6] With respect to employer's contention that Dr. Wicker's opinion should be accorded significant weight, we note that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has held that the opinions of treating physicians may be entitled to greater weight than those of non-treating physicians, and the administrative law judge must therefore consider Dr. Wicker's status as claimant's treating physician in determining the weight to be accorded Dr. Wicker's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Lastly, the record supports the administrative law judge's finding that Dr. Baker had credentials which were superior to those of Dr. Dahhan[7], but we hold that the administrative law judge erred in discounting Dr. Dahhan's relevant opinion on disability solely because the physician did not diagnose pneumoconiosis. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984). On remand, the administrative law judge must therefore reconsider Dr. Dahhan's opinion pursuant to Section 718.204(c)(4).

[6]A medical opinion which merely advises against further coal dust exposure and fails to address claimant's physical capacity to do his usual coal mine employment cannot establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

[7]Dr. Baker's x-ray interpretation on April 5, 1995 indicates that the physician is Board-certified in pulmonary diseases. Director's Exhibit 18. By contrast, Dr. Dahhan's medical opinion was on letterhead which stated that the physician's specialties are internal medicine and chest diseases, but did not specify whether Dr. Dahhan was board-certified in those areas. Director's Exhibit 31.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge